Supreme Court, U.S.
FILED
SEP 13 2004
OFFICE OF THE CLERK

No. 04- 04 371

IN THE

Supreme Court of the United States

AARON C. JAMES,

Petitioner,

vs.

BOOZ-ALLEN & HAMILTON, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELAINE CHARLSON BREDEHOFT
Counsel of Record
PETER C. COHEN
CHARLSON BREDEHOFT, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, Virginia 20190
(703) 318-6800

Counsel for Petitioner

189692

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Does a demotion or reassignment that results in a substantial diminishment of material job responsibilities, but is unaccompanied by a reduction in salary or benefits, constitute an "adverse employment action"?

2. Does *Faragher/Ellerth* set forth the standard for "adverse employment actions" in disparate treatment cases?

3. What constitutes an "adverse employment action"?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vii
Decisions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
A. Mr. James Went From Project Manager/ Director To A Staff Engineer, A Demotion That Resulted In A Significant Diminishment of Material Job Responsibilities	3
B. The Court of Appeals Held That Mr. James Did Not Suffer An Adverse Employment Action Because The Demotion Did Not Result In Economic Harm To Him	7

Contents

	Page
Reasons for Granting the Petition	9
I. The Court Of Appeals Has Decided An Important Title Vii Question – Whether An Adverse Employment Action Can Occur In The Absence Of Economic Harm – In A Way That Conflicts With Relevant Decisions Of This Court	9
II. The Court Of Appeals' Conclusion That Mr. James Did Not Suffer An Adverse Employment Action Because He Did Not Suffer Economic Harm Is In Conflict With The Decisions Of Other Courts Of Appeals	12
III. The Petition Should Be Granted In Order To Clarify Whether *Faragher* And *Ellerth* Set Forth The Standard For "Adverse Employment Actions" In Disparate Treatment Cases	13
IV. The Writ Should Be Granted To Provide Guidance To Lower Courts On What Constitutes An "Adverse Employment Action" In Disparate Treatment Cases	16
Conclusion	19

TABLE OF CITED AUTHORITIES

Page

Cases Cited:

Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir.1996) 17

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) .... *passim*

Corneveaux v. CUNA Mutual Ins. Group, 76 F.3d 1498 (10th Cir.1996) 17

Crady v. Liberty Nat. Bank & Trust Co. of Ind., 993 F.2d 132 (7th Cir. 1993) 10, 13, 14

Davis v. Town of Lake Park, Florida, 245 F.3d 1232 (11th Cir. 2001) 14

Durham Life Ins. Co. v. Evans, 166 F.3d 139 (3rd Cir. 1999) 10

Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) ..... *passim*

Green v. Administrators of the Tulane Educational Fund, 284 F.3d 642 (5th Cir. 2002) 10, 12

Hernandez v. Crawford Bldg. Material Co., 321 F.3d 528 (5th Cir. 2003) 18

Herrnriter v. Chicago Housing Authority, 315 F.3d 742 (7th Cir. 2002) 14

Cited Authorities

Page

Islamic Society of Fire Department Personnel, 205 F.Supp.2d 75 (E.D.N.Y. 2002) 16

Jin v. Metro. Life Ins. Co., 295 F.3d 335 (2nd Cir. 2002) 11

Knox v. Indiana, 93 F.3d 1327 (7th Cir.1996) 16-17

Ledergerber v. Stangler, 122 F.3d 1142 (8th Cir. 1997) 18

Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997) 18

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 11

Passer v. American Chemical Soc., 935 F.2d 322 (D.C.Cir. 1991) 17

Pennsylvania State Police v. Suders, __ U.S.__, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004) 10, 11, 12, 15

Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000) 14, 16,17

Robinson v. City of Pittsburgh, 120 F.3d 1286 (3rd Cir. 1997) 17

Rodriguez v. Board of Education, 620 F.2d 362 (2nd Cir.1980) 13

Cited Authorities

Page

Shakelford v. Deloitte & Touche, 190 F.3d 398 (5th Cir. 1999) 14

Stinnet v. Safeway, Inc., 337 F.3d 1213 (10th Cir. 2003) 14

Tart v. Illinois Power Co., 366 F.3d 461 (7th Cir. 2004) 12

Taylor v. Small, 350 F.3d 1286 (D.C. Cir. 2003) ... 14

Torres v. Pisano, 116 F.3d 625 (2nd Cir.1997) 17

White v. Burlington Northern & Santa Fe Railway Co., 364 F.3d 789 (6th Cir. 2003) 12, 14

Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453 (11th Cir. 1998) 17

Wyatt v. City of Boston, 35 F.3d 13 (1st Cir.1994) .. 16

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1331 & 1343(a) 7

42 U.S.C. § 1981 ..... 2, 4

42 U.S.C. § 2000e-2(a)(1) 1

42 U.S.C. § 2000e-5(f)(1) & (3) 7

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Decided May 14, 2004 ..... 1a

Appendix B — Order Of The United States District Court For The Eastern District Of Virginia, Alexandria Division Dated And Filed April 4, 2003 ..... 17a

Appendix C — Excerpts From Transcript Of Motion Hearing Dated April 4, 2003 ..... 19a

Appendix D — Order Of The United States Court Of Appeals For The Fourth Circuit Denying Petition For Rehearing Filed June 15, 2004 .... 22a

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *James v. Booz-Allen Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004) and at 93 Fair Empl. Prac. Cas. (BNA) 1418 (2004) (App. A). The decision of the District Court was issued from the bench on April 4, 2003, and the relevant excerpt and order are attached (App. B & C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 14, 2004. The Court of Appeals denied a timely petition for rehearing and rehearing en banc on June 15, 2004 (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This Petition involves the following statutory provisions:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

(a) Statement of equal rights

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1981.

STATEMENT OF THE CASE

Aaron C. James suffered a humiliating demotion that stripped him of all his supervisory responsibilities and officially changed his employment status from Project Manager/Director of the largest and most successful project in the history of his employer's Transportation Group to one of many front-line staff engineers providing technical support on the project. Despite the dramatic and significant diminishment in Mr. James' job title and duties, the Court of Appeals held that because Mr. James had received a small

salary increase and a bonus after the reassignment, he did not suffer economic injury, and thus, the reassignment did not result in an adverse employment action.

The Court of Appeals' decision is contrary to three decisions of this Court and conflicts with decisions from four other circuits. In addition, this case presents issues concerning the application of the standards set forth by this Court in *Faragher* and *Ellerth* for "tangible employment actions" to "adverse employment actions" in disparate treatment cases under Title VII, and the ultimate question as to what constitutes an "adverse employment action" in disparate treatment cases – two issues that have divided the circuits.

A. Mr. James Went From Project Manager/Director To A Staff Engineer, A Demotion That Resulted In A Significant Diminishment of Material Job Responsibilities

In 1996, Mr. James was hired by Booz-Allen & Hamilton, Inc. ("BAH") to manage one of its largest projects involving the Washington Metropolitan Area Transit Authority ("WMATA Project"). Mr. James was hired for the Project Manager/Director position because of his vast experience as a transportation engineer and because of his prior work experience with BAH. In addition to his senior level position as Project Manager/Director, Mr. James was hired as a Level 4 Senior Engineer. The next level was Principal, and the level after that, Partner, was the highest level at BAH. Mr. James was on track to becoming a Partner at BAH.

As Project Manager/Director of the WMATA Project, Mr. James reported directly to the head of BAH's Transportation Group, Ghassan Salameh. Mr. James also

supervised 25-30 full-time employees, which was the largest number of employees assigned to a Transportation Group project.[1] The WMATA Project was a huge success under Mr. James' management. During his tenure, the WMATA Project generated annual revenue of $7-10 million and total revenues of $25-30 million, and became the largest contract in the Transportation Group's history, both in terms of revenue and the number of employees assigned to work on the project.[2]

However, in February 1999, BAH suddenly removed Mr. James as the Project Manager/Director of the WMATA Project, and replaced him with a less-qualified white male, Karl Berger.[3] Instead of managing and directing the largest and most lucrative and successful project in the history of the Transportation Group, BAH reassigned Mr. James to be one of twelve staff engineers in the Transportation Group's engineering department. As a staff engineer, Mr. James no longer supervised a staff of 25-30 employees (he no longer supervised any employees) and he no longer reported to the head of the Transportation Group, Mr. Salameh. After the reassignment, Mr. James was made to report to persons whom

---

1. The average number of employees assigned to work on other Transportation Group projects was 6 to 12.

2. The average annual revenue for the Transportation Group's other projects was $2-5 million.

3. After three months as Project Manager/Director, Mr. Berger was fired for incompetence. Mr. James contends that the decisions to remove him as Project Manager/Director and replace him with Mr. Berger were impermissibly motivated by his race (African-American). He asserts claims for disparate treatment under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.

he used to supervise when he was Project Manager/Director of the WMATA Project. In his reassigned role as staff engineer, Mr. James provided technical support for the WMATA Project he once managed, and he no longer participated in management-level meetings concerning the project.

As a result of the reassignment, Mr. James no longer functionally performed Level 4 work, was no longer eligible for future bonuses at that level, and was no longer in a position to advance to the more senior levels of Principal and Partner. In sum, Mr. James had been demoted, and his reassigned duties were qualitatively and significantly different and less prestigious than the duties he had as Project Manager/Director of the WMATA Project. By contrast, Mr. James' successor, Mr. Berger, was given a higher bonus and a higher salary of $125,000 ($25,000 more than Mr. James was paid as Project Manager/Director). In addition, Mr. Berger was provided with significantly more staff than had been given to Mr. James.

The demotion and corresponding loss of supervisor authority, prestige, and future promotional opportunities were devastating to Mr. James, particularly given the success of the WMATA Project under his stewardship. He went from being the Project Manager/Director of the largest and most successful and lucrative Transportation Group project to one of a number of front-line staff engineers providing technical support for the project he once led. He went from the highest management position in the project to a subordinate, non-management technical position; from supervising a staff of 25-30 employees to supervising no employees; from reporting to the leader of the Transportation Group to reporting to former subordinates whom he had once supervised; from

running the entire project (with great success) to performing small engineering tasks for the project. In the process, Mr. James lost the prestigious title of Project Manager/ Director, was stripped of all supervisory authority, and was taken off the promotional track for the most senior level and lucrative positions in the company.

As a result of a demotion that had essentially placed him in a dead-end job, Mr. James' professional reputation both inside and outside of BAH had been damaged. "I just didn't feel productive from that point on . . . I had been placed in a position where there was really no way out." In addition, Mr. James was told by a Vice President and Partner at BAH that, in light of the demotion, Mr. James no longer had a future at the company, and that "between you and me, I would start looking for another job if I was you."[4]

Nevertheless, in demoting Mr. James, BAH did not reduce his salary or benefits. After the demotion, he was given a raise of five-percent, which was much smaller than the raises he would have received had he continued as Project Manager/Director, and was substantially less (by $20,000) than the salary increase given to his successor, Mr. Berger. After the demotion, Mr. James also received a bonus of $15,000, *not* for his work as a staff engineer, but as a reward for the outstanding work he did in his last year as Project Manager/Director of the WMATA Project (a fact ignored by the lower courts). As a staff engineer no longer performing Level 4 work, Mr. James no longer qualified for future bonuses or salary increases at that level.

---

4. As a consequence of the humiliating demotion and being told by a BAH Vice President to look elsewhere for a job, Mr. James felt he had no choice but to resign, and contended in the lower courts that he was constructively discharged.

B. The Court of Appeals Held That Mr. James Did Not Suffer An Adverse Employment Action Because The Demotion Did Not Result In Economic Harm To Him

The District Court, against the great weight of the evidence, held that Mr. James had not suffered a demotion at all:

> There was no demotion. There was a transfer of responsibilities. The man's salary was not affected. He received his bonus. He still had professional-level work. He was still, if he wanted to, on track for promotion. There simply is not in the record the adverse action that would satisfy that element.[5]

Given the evidence of a substantial diminishment of Mr. James' duties, whether he was demoted or not presented a clear factual question for a jury. In any event, in its brief analysis of the issue, the District Court evaluated whether Mr. James had suffered an "adverse employment action" in the context of whether economic harm resulted from the "transfer of responsibilities." Concluding that there was no economic harm, the District Court found no adverse employment action.

---

5. The District Court issued its summary judgment ruling from the bench, and the excerpt above constitutes the court's entire analysis of the "adverse employment action" issue in this case (App. C). The District Court had jurisdiction over Mr. James' Title VII claim under 42 U.S.C. § 2000e-5(f)(1) & (3) and over Mr. James' section 1981 claim under 28 U.S.C. §§ 1331 & 1343(a).

The Court of Appeals also shied away from referring to what happened to Mr. James as a demotion, calling it a "reassignment" instead. 368 F.3d at 376. The Court of Appeals held that Mr. James did not suffer an adverse employment action because he did not suffer economic harm as a result of the reassignment:

> James retained his position of Senior Associate [Level 4] and received the same pay, benefits, and other terms and conditions of employment. He even received a five-percent raise after the reassignment and a $15,000 bonus, the largest performance bonus he had ever received with BAH.

Id. at 376-77.

Ignoring the significant and qualitative differences between being the Project Manager/Director of the hugely successful and prestigious WMATA Project and being one of numerous staff engineers providing technical support on the project, the Court of Appeals characterized Mr. James' reassigned role as staff engineer as "professional-level work" and as encompassing "a preexisting area of responsibility," and that "success in this area of responsibility would enhance his future chances for promotion." *Id.* at 377. Finding no economic harm to Mr. James, the court thus found no adverse employment action.

Both the District Court and the Court of Appeals disregarded important parts of the factual record that showed that the "reassignment" did inflict economic harm on Mr. James, notwithstanding the small raise and the bonus he received after the reassignment for the earlier work he had

done as a Project Manager/Director. As a result of the reassignment, Mr. James was no longer functionally performing as a Level 4 employee, and thus, was no longer eligible to receive future bonuses at that level. After the reassignment, Mr. James was also no longer in a position to receive salary increases commensurate with that of a Project Manager/Director, as evidenced by the substantial raise that was given to his successor, Mr. Berger. And due to the reassignment, Mr. James was no longer in line to become a Principal or Partner.

Nevertheless, even if we assume for purposes of the instant petition that the Court of Appeals' determination was correct that the "reassignment" resulted in no economic harm to Mr. James, he still suffered an adverse employment action.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT TITLE VII QUESTION – WHETHER AN ADVERSE EMPLOYMENT ACTION CAN OCCUR IN THE ABSENCE OF ECONOMIC HARM – IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The question presented is whether an employee's demotion or reassignment, together with a substantial diminishment of his material job responsibilities, is sufficient to constitute an "adverse employment action," even though the employee did not suffer economic harm as a result of the demotion or reassignment. The Court of Appeals held that Mr. James' "reassignment" did not result in economic harm, and thus, the reassignment was not an adverse employment action.

The Court of Appeals' conclusion, however, conflicts with this Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Pennsylvania State Police v. Suders*, __ U.S. __, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004).

In *Faragher* and *Ellerth*, this Court defined a "tangible employment action" as "a significant change in employment status, such as . . . reassignment with significantly different [job] responsibilities . . . demotion, or undesirable reassignment." *Faragher*, 524 U.S. at 808, 118 S. Ct. at 2293; *Ellerth*, 524 U.S. at 761, 118 S. Ct. at 2268-69 (*citing Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation")).

Although this Court acknowledged in *Ellerth* that in most cases a tangible employment action inflicts economic harm, 524 U.S. at 762, 118 S. Ct. 2269, it did not hold, and has never held, that economic harm is required in all cases. *See Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642, 654 (5th Cir. 2002) ("While . . . *Ellerth* acknowledged that in most cases a tangible employment action inflicts economic harm, the Supreme Court did not state that loss of an economic benefit was required in all cases"); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 153-54 (3rd Cir. 1999) ("Although direct economic harm is an important indicator of a tangible adverse employment action,

it is not the *sine qua non*"); *Jin v. Metro. Life Ins. Co.*, 295 F.3d 335, 346-48 (2nd Cir. 2002) (finding that *Faragher* and *Ellerth* did not mandate direct economic harm as a basis for finding a tangible employment action); *see also Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986) (rejecting the notion that Title VII only applied to overcoming economic barriers).

In Mr. James' case, he was "reassign[ed] with significantly different [job] responsibilities" that resulted in a "significant change in [his] employment." *See* Statement of the Case, section A. Applying the *Faragher/Ellerth* standard, Mr. James plainly suffered an adverse employment action, regardless of whether he suffered economic harm as a result.

The Court of Appeals' contrary conclusion that Mr. James' reassignment did not constitute an adverse employment action also conflicts with this Court's recent pronouncement in *Suders* that a "humiliating demotion" that "officially chang[es] [the plaintiff's] employment status or situation" and results in a constructive discharge constitutes a tangible employment action. 124 S. Ct. at 2347. This standard aptly describes Mr. James' case. He quit in reasonable response to a humiliating demotion that stripped him of all his supervisory responsibilities and officially changed his employment status from Project Manager/ Director of the largest and most successful Transportation Group project in history to one of many front-line staff engineers providing technical support on the project with diminished prospects for bonuses and promotions.[6]

---

6. *Suders* was decided on June 14, 2004, a month after the Court of Appeals decided Mr. James' case. Another reason for granting the instant petition is so that the Court of Appeals' decision can be vacated in light of *Suders*.

In sum, the Court of Appeals' conclusion that Mr. James' demotion or reassignment did not constitute an adverse employment action because it did not inflict economic harm conflicts with this Court's definition of a "tangible employment action" in *Faragher* and *Ellerth*, and with this Court's recognition of a "humiliating demotion" as a tangible employment action in *Suders*. Accordingly, Mr. James' petition for writ of certiorari should be granted.

II. THE COURT OF APPEALS' CONCLUSION THAT MR. JAMES DID NOT SUFFER AN ADVERSE EMPLOYMENT ACTION BECAUSE HE DID NOT SUFFER ECONOMIC HARM IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The Court of Appeals' conclusion that Mr. James' demotion or reassignment did not constitute an adverse employment action because it did not inflict economic harm is in conflict with decisions from at least four other circuits. *See Tart v. Illinois Power Co.*, 366 F.3d 461, 473-76 (7th Cir. 2004) (reassignment of plaintiffs from highly-skilled positions to unskilled subordinate positions found to be adverse employment actions even though plaintiffs retained their salaries and benefits); *Green v. Administrators of Tulane Educational Fund*, 284 F.3d 642, 654-55 (5th Cir. 2002) (change of plaintiff's employment status from office manager to administrative assistant and corresponding reduction of job responsibilities while receiving same salary and benefits constituted adverse employment action); *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789, 803 (6th Cir. 2003) (transfer/reassignment of female forklift operator to track laborer job was a demotion that constituted an adverse employment action despite no change in pay);

Rodriguez v. Board of Education, 620 F.2d 362, 364-66 (2nd Cir. 1980) (adverse employment action established where "severe professional . . . trauma" resulted from difference in "the site of [teacher's] work and the age of her pupils" even though the transfer "does not and will not diminish [teacher's] salary [and] does not and will not reduce her benefits").

Mr. James' petition for writ of certiorari should be granted to resolve this conflict, and to clearly articulate the principle that an employee's demotion or reassignment, together with a substantial diminishment of material job responsibilities, is sufficient to constitute an adverse employment action, even if the employee does not suffer economic harm as a result of the demotion or reassignment.

III. THE PETITION SHOULD BE GRANTED IN ORDER TO CLARIFY WHETHER *FARAGHER* AND *ELLERTH* SET FORTH THE STANDARD FOR "ADVERSE EMPLOYMENT ACTIONS" IN DISPARATE TREATMENT CASES

This Court has never explicitly stated what constitutes an adverse employment action in a disparate treatment case.[7] In *Faragher* and *Ellerth*, the Court referred to "tangible employment actions," but the discussion in those cases concerned the types of employment actions that, if taken by a supervisor, would subject the employer to vicarious liability for harassment. Nevertheless, in defining "tangible employment actions," the Court cited circuit-level Title VII disparate treatment cases that defined "adverse employment actions," notably the Seventh Circuit's definition in *Crady*,

7. As a consequence, the circuits are currently split on the issue. *See infra* section IV.

993 F.2d at 136 (quoted above) that included a "materially adverse change" in employment indicated by "a less distinguished title" or "significantly diminished material responsibilities."

Although this Court has never expressly authorized it, several circuits have applied the *Faragher/Ellerth* definition of "tangible employment action" to adverse employment actions in disparate treatment and retaliation cases. *See Shakelford v. Deloitte & Touche*, 190 F.3d 398, 407 (5th Cir. 1999); *White v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789, 795 (6th Cir. 2004); *Herrnriter v. Chicago Housing Authority*, 315 F.3d 742, 744 (7th Cir. 2002); *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003); *Stinnet v. Safeway, Inc.*, 337 F.3d 1213, 1217 (10th Cir. 2003); *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232, 1239 (11th Cir. 2001).

However, at least one circuit to date has expressly declined to extend the *Faragher/Ellerth* definition of "tangible employment action" beyond the context of supervisory harassment. *See Ray v. Henderson*, 217 F.3d 1234, 1242 n. 5 (9th Cir. 2000) ("[W]e reject the contention that *Burlington Industries* set forth a standard for adverse employment actions in the anti-retaliation context").

It is important to Mr. James' case, as well as to resolve the circuit split caused by the Ninth Circuit's ruling in *Ray*, that this Court state definitively whether the standard for "tangible employment action" set forth in *Faragher* and *Ellerth* applies as well to the concept of "adverse employment action" in disparate treatment cases like Mr. James'. If the answer is yes – that the *Faragher/Ellerth* standard does apply to adverse employment actions in disparate treatment cases

– then, we submit, the Court of Appeals' decision in the instant case should be reversed, or at the very least, vacated, so that the *Faragher/Ellerth* standards of "demotion," "significant change in employment status," "reassignment with significantly different [job] responsibilities," and "undesirable reassignment," as well as the *Suders* standard of "humiliating demotion," can be applied to the facts of Mr. James' case in determining whether he suffered an adverse employment action, which neither the District Court nor the Court of Appeals did.

On the other hand, if the answer to the above question is no – that the Ninth Circuit was right when it stated that the *Faragher/Ellerth* standard for tangible employment actions in supervisory harassment cases does not extend to adverse employment actions in disparate treatment cases – then the issue naturally arises as to what does constitute an "adverse employment action" in the context of disparate treatment cases. This is an issue not only of considerable importance to Mr. James' case and to Title VII jurisprudence generally, but is one of considerable confusion in the circuits, to which we now turn.

IV. THE WRIT SHOULD BE GRANTED TO PROVIDE GUIDANCE TO LOWER COURTS ON WHAT CONSTITUTES AN "ADVERSE EMPLOYMENT ACTION" IN DISPARATE TREATMENT CASES

Several courts and law review articles have documented the split in the circuits as to what constitutes an "adverse employment action," a term that is not defined in Title VII.[8]

Specifically, the First, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits take a more expansive view of the type of actions that can be considered adverse employment actions. *See Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (adverse employment actions include "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees"); *Knox v. Indiana*, 93

8. *See Ray*, 217 F.3d at 1240-42 (surveying how the circuits have aligned themselves with a broad, restrictive, or intermediate position as to what constitutes an adverse employment action under Title VII – the First, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits adopting an expansive view of the types of actions that can be considered adverse employment actions, the Fifth and Eighth Circuits adopting a restrictive view, and the Second and Third Circuits adopting an intermediate position); *Islamic Society of Fire Department Personnel*, 205 F.Supp.2d 75, 82-83 & n. 7 (E.D.N.Y. 2002) (same survey of the circuits and citing three law review articles that discuss the circuit split on what constitutes an adverse employment action in disparate treatment and retaliation cases); *see also* Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing*, 56 Okla.L.Rev. 623, 638-55 (2003) ("[T]he circuit courts are divided as to how much harm an employee must endure before claims of disparate treatment and retaliation are actionable").

F.3d 1327, 1334 (7th Cir. 1996) (employer can be liable for retaliation if it permits "actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services . . . or cutting off challenging assignments"); *Corneveaux v. CUNA Mutual Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996) (employee demonstrated adverse employment action under the ADEA by showing that her employer "required her to go through several hoops in order to obtain her severance benefits"); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (malicious prosecution by former employer can be adverse employment action); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (adverse employment actions include an employer requiring plaintiff to work without lunch break, giving her a one-day suspension, soliciting other employees for negative statements about her, changing her schedule without notification, making negative comments about her, and needlessly delaying authorization for medical treatment); *Passer v. American Chemical Soc.*, 935 F.2d 322, 330- 331 (D.C. Cir. 1991) (employer's cancellation of a public event honoring an employee can constitute adverse employment action under the ADEA, which has an anti-retaliation provision parallel to that in Title VII); *Ray*, 217 F.3d at 1240-42.

The Second and Third circuits hold an intermediate position within the circuit split. They have held that an adverse action is something that materially affects the terms and conditions of employment. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3rd Cir. 1997) ("retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment . . . to constitute [an] 'adverse employment action'"); *Torres v. Pisano*, 116 F.3d 625, 640 (2nd Cir. 1997)

(to show an adverse employment action employee must demonstrate "a materially adverse change in the terms and conditions of employment").

The Fifth and Eighth Circuits, adopting the most restrictive test, hold that only "ultimate employment actions" such as hiring, firing, promoting and demoting constitute actionable adverse employment actions. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (only "ultimate employment decisions" can be adverse employment decisions), applied in *Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 531-32 (5th Cir. 2003); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir.1997) (transfer involving only minor changes in working conditions and no reduction in pay or benefits is not an adverse employment action).

What constitutes an "adverse employment action" is at the heart of disparate treatment cases under Title VII, and is at the heart of Mr. James' case. In the absence of concrete guidance, the circuits are divided on the issue. Depending in which circuit a plaintiff's claim arises, varying standards will be applied, with varying and disparate results.

In Mr. James' case, the Court of Appeals held that he suffered no economic harm, and thus no adverse action, despite significant material alterations in his position and duties. Had his claim arose in another circuit, the result would very likely have been different. The instant petition should be granted so that one uniform standard can apply to the concept of adverse employment actions in disparate treatment cases.

CONCLUSION

Petitioner Aaron C. James prays that this Court grant this Petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Respectfully submitted,

ELAINE CHARLSON BREDEHOFT
Counsel of Record
PETER C. COHEN
CHARLSON BREDEHOFT, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, Virginia 20190
(703) 318-6800

Counsel for Petitioner